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Book Review: Indigenous Difference and the Constitution of Canada, by Patrick Macklem

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INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA BY PATRICK MACKLEM (TORONTO: UNIVERSITY OF TORONTO PRESS, 2001)[1]

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Patrick Macklem's book explores the constitutional relationship between Aboriginal people and the Canadian state, arguing that the special features of this relationship mandate constitutional protection of indigenous difference in the name of equality. It is a book full of the rigour typical of the best academic scholarship and exhibits throughout the concern and aspiration for justice on which law depends for its normative power and integrity. With an approach that is pragmatic, contextual, and principled, Macklem confronts all the difficult questions head-on.

The central organizing principle of Macklem's argument is the principle of equality within a constitutional framework of distributive justice. Constitutionalism is redefined in his work as a distributive enterprise. "As a distributive enterprise, constitutional law implicates an aspiration that power be distributed in a just manner."[3] Justice is defined by reference to the value of equality. As a result, everything in Macklem's vision of justice turns on the meaning of equality. Drawing on authority that

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[1] [hereinafter *Indigenous Difference*]. The reviewer would like to express many thanks to Ian B. Lee and Brian Slattery for carefully reading drafts of this review, making many thoughtful and helpful suggestions, and providing ongoing support, encouragement, and inspiration. Thanks also to David B. Goldman, Terri Libesman, and James Tully for thought-provoking and encouraging response. Last but not least, thanks to Linda Hutjens for her kind and meticulous proofreading of what was meant to be the final draft. Any errors that remain are my own.

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[3] *Ibid.* at 22.

is both contemporary[4] and as ancient as Aristotle[5] in western legal and political thought, Macklem observes that equality demands that like cases be treated alike and different cases be treated differently. Equality requires that all potential recipients of a distribution be treated as equals unless a valid reason exists, related to the good in question, for differential treatment. The equality of a particular distributive choice has to be judged in relation to the good that is being distributed. The good in question in this case is constitutional power (rights and jurisdiction).[6] The applicable group claiming constitutional power is the indigenous peoples of Canada. The question, therefore, is: are there any valid reasons that differentiate indigenous peoples from other groups in the constitution of Canada that would justify a pluralistic and non-uniform distribution of constitutional power that accords to Aboriginal peoples rights and jurisdictions different from those accorded to non-Aboriginal peoples? If this question can be answered in the affirmative, then the presence of differentiated rights for Aboriginal peoples in the constitution of Canada will not necessarily contradict a constitutional commitment to equality. In fact, if the precept of equality requires that like cases be treated alike and that different cases be treated differently and a relevant difference between Aboriginal and non-Aboriginal peoples is identified, a constitutional commitment to the principle of equality would appear not only to be consistent with but to actively warrant a pluralistic non-uniform redistribution of constitutional power in Canada. The answer to this question, however, cannot be philosophically deduced from the principle of equality. To make a judgment about whether there are factors differentiating indigenous peoples from other groups in the constitution of Canada, which support their case for distinct rights and jurisdiction, it is necessary to review the relationship between indigenous peoples and the constitution of Canada. This is where history becomes constitutionally relevant and Macklem's summation of the relevant history in terms of "the four complex social facts that define indigenous difference"[7] absolutely central. In fact, these four social facts, from a normative perspective, are so central to the struggle of indigenous peoples for recognition and Macklem's argument that they bear repeating:

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[4] See *e.g.* M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) [hereinafter *Spheres of Justice*] referred to by Macklem, *Indigenous Difference*, *supra* note 1 at 28.

[5] See *Indigenous Difference*, *ibid.* at 29, referring to Aristotle's *Nichomachean Ethics*.

[6] See *ibid.* at 21 for a more detailed description of what Macklem means by constitutional power.

[7] *Ibid.* at 4.

> First, Aboriginal people belong to distinctive cultures that were and continue to be threatened by non-Aboriginal beliefs, philosophies, and ways of life. Second, prior to European contact, Aboriginal people lived in and occupied North America. Third, before European contact, Aboriginal people not only occupied North America; they exercised sovereign authority over persons and territory. Fourth, Aboriginal people participated in and continue to participate in a treaty process with the Crown.[8]

Macklem's argument is that these four complex social facts lie at the heart of the relationship between Aboriginal people and the Canadian state. They are the crucial evidence in the case for the existence of a relevant difference between Aboriginal and non-Aboriginal peoples with implications for the constitution and the distribution of rights and jurisdictions in Canada.

Throughout the book, Macklem steers clear of simplistic generalizations that overlook the relevant differences between Aboriginal people and other groups who have suffered unjust treatment and continue to experience discrimination. For instance, he avoids contrasting Aboriginal people with other "voluntarily incorporated" Canadians. Macklem notes the existence of groups, such as refugees and descendants of slaves, who cannot adequately be comprehended in the framework of overgeneralized antitheses and homogenizing genealogies that fail to recognize relevant differences within non-Aboriginal Canada and instead simply distinguish between Aboriginal and non-Aboriginal people.[9] He avoids both the error of essentializing Aboriginal identity[10] and of imagining Canada in an irremediably imperial-colonial framework.[11] Critiques of essentialism work both ways and liberate the imagination of Canada, as much as the imagination of Aboriginal peoples, from fixed representations that petrify meaning outside the flux of time, the realities of change, and the possibilities of transformation.

Macklem's book can be read on many levels. The pragmatic and normative dimensions of his inquiry are not exclusive but analytically distinguishable. A practical concern for ameliorating injustice leads Macklem not to exclude any existing sources of legal protection even as he critically questions the implicit normative justifications of potentially

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[8] *Ibid.* at 4. See also *ibid.* at 167.

[9] See *e.g.* his discussion in *ibid.* at 47, 48, 73, 129-31.

[10] In addition to Chapter Two, see *ibid.* at 169-70 where Macklem critiques frozen-rights approaches to the constitutional protection of cultural identity and difference.

[11] Although I do not discuss Macklem's approach to the *Charter* in this review, his anti-essentialist thesis is applied illuminatingly in that context, acknowledging on the one hand the danger of the *Charter* being used to authorize "judicial reorganization of Aboriginal societies according to non-Aboriginal values" and, on the other, resisting fixing the *Charter* within a culturally imperialistic framework. See *ibid.* c. 7 especially at 194-95.

supportive doctrine within positivist frameworks. For example, he questions, at the normative level, grounding Aboriginal rights in the logic of prior occupancy but does not exclude this line of reasoning because a critique requires a more general and principled review of law based on this logic and not simply the arbitrary exclusion of Aboriginal people from its general application.[12] If non-Aboriginal people are protected by law based on this logic, then a valid reason must be shown for not applying it to Aboriginal people. Macklem suggests that the reasons that have been offered historically are based on unjustified and unjust assumptions (for example, racial discrimination and Aboriginal peoples' cultural inferiority) and, therefore, cannot withstand scrutiny unless other defensible reasons can be offered, or questions of justice are deemed irrelevant to the constitution of law. In each chapter, he systematically discusses textual references and judicial interpretations[13] consistent with a belief that power be distributed in a just manner and amenable to supporting the protection of Aboriginal interests, whatever the internally stated legal reason.

Macklem's project, though, is much more ambitious than "simply" providing an extensive resource of pragmatic strategies grounded in text, structure and precedent for furthering the recognition and protection of Aboriginal interests in culture, territory, and sovereignty. The book is much more than a socially and politically conscious and concerned orchestration of legal technical virtuosity for externally justified ends. Macklem is concerned with reintegrating law with justice and in doing so *recovering* the ethical integrity of Canadian constitutionalism from the betrayals of justice that Canadian law has incorporated into its own logic of sovereignty and authorized in relation to Aboriginal peoples because they did not conform to falsely universalized cultural preconceptions of humanity. These betrayals include the dispossession of land and laws, breach of treaty obligations, denial of jurisdictional authority, destruction of the cultural medium in which law's meaning is embedded, destruction of beliefs, traditions, languages and ways of life, forced removals of communities, and break-up of traditional community and family structures. These values, and

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[12] See *e.g. ibid.* at 85 and surrounding argument.

[13] In terms of case analysis and legal texts, Macklem's primary focus is on the doctrinal development of Aboriginal rights, treaty, and *Charter* jurisprudence relevant to Aboriginal peoples in Canada. Here his book could serve, if nothing else, as an excellent companion commentary. Less comprehensively but still incorporated into the analysis is reference to U.S. jurisprudence and history (particularly pre-twentieth century). Relevant instruments, doctrines, and precedents in international law are also discussed. There is occasional reference to other Commonwealth jurisdictions, in particular Australia post-*Mabo*. See *Mabo and Others* v. *Queensland* (No. 2) (1992) 175 CLR 1 (H.C. Aus.). Notwithstanding the focus on Canada, the cross-fertilization of doctrine, precedent, and ideas in Commonwealth history and jurisprudence makes Macklem's text clearly relevant beyond the Canadian context.

the underlying recognition of humanity on which they are predicated, are what are at stake in the struggle for recognition and renewal of Aboriginal interests in culture, territory, and sovereignty. They implicate not only Aboriginal peoples but the value structure of Canadian law and society.

It is these broader concerns that lead Macklem to move beyond questions of validity in a positivist framework and engage questions of legitimacy in a constitutionalist framework.[14] In many ways, his work can be read as a protest against the positivist alienation of questions of value and meaning from the constitution of law. He manifests this protest by continually questioning the normative reasons that ground positivist validity (and legal order) in deeper references of meaning and ultimately the horizon of justice, which for him means distributive justice normatively integrated by a commitment to equality. Jurisprudence has to incorporate critical response-ability in relation to normative questions concerning law's justice and meaning if the presumptive habits of obedience on which "normal" legal order rests are to resist disintegration into arbitrary and/or coercive orders of power when challenged or questioned. For law to manifest legitimacy, it must express itself and aspire to become an integral order of justice and meaning.[15] The distinguishing claim of Macklem's book is to provide normative justification for a redistribution of constitutional power in Canada responsive to indigenous difference as a question and requirement of fundamental justice.

It is sometimes argued from a liberal constitutional viewpoint that recognition of differentiated group rights by definition contravenes the norm of equality and cannot be reconciled with a constitutional theory of justice that is normatively structured by a fundamental commitment to equality. From this perspective, recognition of indigenous difference appears, at best, conceptually anomalous—a puzzling exception to a baseline normative commitment to equality in modern liberal and social democratic traditions of constitutionalism. Macklem's work is a book-length exposition of the conceptual and normative flaws of this thesis. His approach is self-consciously differentiated from philosophical theories of justice that abstract from history and contemporary social realities. In this respect, his approach has greater affinity with the more historically conscious theories of Habermas, Walzer, and Taylor[16] and intercultural

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[14] *Indigenous Difference*, *supra* note 1 at 151: "text alone does not resolve questions concerning the justice of existing constitutional arrangements; it merely clarifies what requires justification."

[15] See B. Slattery, "Law's Meaning" (1996) 34 Osgoode Hall L.J. 553.

[16] See *e.g.* J. Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed. by C. Cronin & P. DeGreif (Cambridge, Mass.: MIT Press, 1998); *Spheres of Justice*, *supra* note 3; and C. Taylor, *Multiculturalism and "The Politics of Recognition": An Essay* (Princeton: Princeton University Press,

constitutionalists like Slattery, Borrows, and Tully[17] than the more decontextualized theories of Rawls or Dworkin.[18] Although many of his arguments and his constitutional methodology can be applied to other contexts (for example, adjudicating the justice of recognizing Quebec difference), Macklem makes a point of emphasizing that questions of justice cannot be resolved in abstraction from history. For example, he argues that in evaluating claims to sovereignty based on principles of formal and substantive equality, it is impossible to assess the justice of these claims without reference to history and contemporary social realities.[19] This also explains the centrality of the four social facts that define indigenous difference in his thesis. Historical consciousness is a source of hermeneutic discernment in the jurisprudential process of evaluating the justice of a particular claim to differentiated or assimilative recognition.

Macklem also distinguishes his approach from classic universalist and relativist positions. Although he presents himself as "sidestepping"[20] the universalist-relativist debate, his approach is perhaps better conceptualized as an intermediation rather than an avoidance of the debate. Macklem's work can be understood as a response to the search for an intercultural jurisprudential logic capable of mediating and adjudicating differing approaches to the recognition of indigenous difference in the constitution of Canada as a matter of justice rather than power. Understood in this way, his approach cannot avoid the question of common

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1992).

[17] See *e.g.* B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall L.J. 101 [hereinafter "Organic"]; J.J. Borrows, "A Geneology of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291 [hereinafter "Geneology"]; and J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York; Cambridge University Press, 1995) [hereinafter *Strange Multiplicity*].

[18] See *e.g.* J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1999); R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986). At the same time, Macklem draws and synthesizes into his work both Dworkin's reflections on the meaning of equality and Rawl's reflections on the conditions of just order. See *e.g. Indigenous Difference*, *supra* note 1 at 31, n.61. See also *e.g. ibid.* at 157, where Macklem, following Robert Williams, imaginatively applies Rawl's theory to assessing the justice of treaty distributions of sovereignty: "relying on hypothetical consent enables the separation of questions relating to actual constitutional arrangements from questions relating to the justice of such arrangements." Macklem argues that this approach is particularly valuable in contexts where treaties negotiated between the Crown and Aboriginal peoples are manifestly unjust and can only be explained by factual domination of power. In particular, for Macklem's discussion of extinguishments clauses, see *ibid.* at 158.

[19] A comparison can here be drawn with James Anaya's approach to the remedial dimensions of self-determination in S.J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) [hereinafter *International Law*]. See also B. Slattery, "The Paradoxes of National Self-Determination" (1994) 32 Osgoode Hall L.J. 703.

[20] *Indigenous Difference*, *supra* note 1 at 40.

horizons (the search for overlapping normative consensus) at the heart of the struggle for a just reconciliation of the universal with the particular, even if the answer he gives escapes the perils of philosophical indeterminacy and historical overdetermination. Indeed, that is the virtue of his approach. Ultimately, his work is a wager on an affirmative answer to the question: can the quest for right become a question of dialogue and translation between conflicting interpretations, a struggle between competing meanings won by reference to historically conscious reason and bound by universally liberating horizons of justice, rather than coercive power and factual capacity to dominate and suppress (for example, through unfair rules of evidence)[21] the human will-to-meaning of the other?

Questioning the legitimacy of prevailing distributions of constitutional power (rights and jurisdictions) in Canada in relation to Aboriginal peoples is not simply a deconstructive exercise. It is also a reconstructive exercise rooted in the possibility of redefining the relationship between Aboriginal people and the Canadian constitutional order in terms that do greater justice to both Aboriginal people and the many other people who live in Canada. The genuine challenge posed by Aboriginal peoples is converting the social fact of sharing Canada into a value and vision of coexistence that overcomes past injustice and builds feelings of mutual respect and solidarity rather than mutual alienation, resentment, and guilt between Aboriginal and non-Aboriginal peoples.[22] Macklem makes a significant contribution to this project of reconciliation and reconstruction in four especially significant ways.

First, Macklem develops a normative theory of justice (distributive justice governed by the principles of substantive and formal equality) that can serve to mediate the legal and political processes of working out a more just distribution of constitutional power in Canada. The essence of his argument is that the principles of substantive and formal equality have the capacity to engender a significant degree of cross-cultural normative consensus to mediate and adjudicate conflicting claims for recognition between the plural, overlapping communities that constitute Canada. These principles do not answer in themselves the question of whether a particular

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[21] For example, the exclusion or devaluation of oral histories prior to *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*], or the textualization of treaties and rights in normative languages alien and alienating vis-à-vis Aboriginal understandings. On *Delgamuukw* and historic exclusion of oral evidence, see *Indigenous Difference, supra* note 1 at 90, 148-49. On the traditional tendency to interpret abstract treaty rights with reference to non-Aboriginal norms and values, see *ibid.* c. 5 at 136-40 to review Macklem's discussion of treaty jurisprudence. For the discussion on *Charter* jurisprudence, see *ibid.* c. 7 at 195ff.

[22] Macklem does not engage Cairns in his work but a fruitful dialogue is opened by this question between his book and A.C. Cairns' book, *Citizens Plus* (Vancouver: The University of British Columbia Press, 2001).

distribution is just, but they do provide a mutually intelligible framework for mediating conflicting interpretations of what justice requires in any particular case. The problem with hegemonic liberal and social-democratic interpretations of the norm of equality is that they fail to recognize that equality has to be judged both in relation to the good to which it is being applied and with a consciousness of the history of the relationship between the good in question and the individual or group claiming the good—in this case, the history of the relationship between indigenous people and constitutional power in Canada. Macklem convincingly shows that equality properly understood is a norm that requires context-sensitive differentiation and not uniform distributions of rights and jurisdictions.

Macklem's second contribution relates to his acknowledgement of the distributive power of law. Legal outcomes are not inevitable realities but the contingent result of discernable normative choices and historically bound political struggles. In this respect, Macklem's work intersects with and draws on the deconstructive work of neo-realist critical legal scholars[23] in exposing the ideological function of law in stabilizing distributions of power. But he does not accept as inevitable or essential the legitimation crisis posed by law's historic complicity in unjust distributions. Instead, he harnesses this insight to focus on the possibilities and vocational responsibility of law in reconstructing relations of redistributive justice. Macklem's critique, in other words, is not simply an exercise of delegitimation and deconstruction, but a project of potential relegitimation aimed at regenerating a meaningful relationship between law and justice. It must be emphasized that this is not simply an instrumentalization of the ideological function of law in society, but involves redefining the constitution of law so that the ethical relation between law and justice becomes integral to the meaning of law. By defining law in relation to justice, it cannot be reduced to its ideological function of stabilization. This is because justice is never a completely fulfilled reality. Justice in relation to law is both the aspiration of law that integrates law's meaning over time and, at the same time, a never-ending source of critique. Justice, in other words, inspires the vision and the revision of law's meaning over time. Law's meaning is constituted through the ethical relationship between law as an extant reality and the becoming of law as justice, which is infinite. The

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[23] Macklem refers in particular to the works of D. Kennedy, *A Critique of Adjudication* (Cambridge, Mass.: Harvard University Press, 1997) which argues that non-regulatory understandings of the common law conceal its distributive dimension and naturalize existing distributions; J.W. Singer, "Property and Social Relations: From Title to Entitlement" in G.E. van Maanen & A.J. van der Walt, eds., *Property Law on the Threshold of the 21st Century* (Apeldorn: Maklu, 1996) 69; and D. Kennedy & F. Michelman, "Are Property and Contract Efficient?" (1980) 8 Hoftstra L. Rev. 711. References to the above are in *Indigenous Difference*, *supra* note 1 at 98, n.66 and also in his discussion of the positive dimensions of constitutional rights, *ibid.* at 237-38.

surplus of law's meaning in relation to justice is, as I read Macklem, the sense of his repeated calls for law, especially constitutional law, to be viewed not as "a static body of manifest legal rules"[24](the error of positivism) but as "an active, evolving and interpretive inquiry ... disciplined but not determined by text, structure or precedent."[25] The same point is mirrored in his discussion of international law.[26] It is also implicit in Macklem's characterization of "constitutional law as more than a limited number of textual and structural imperatives and a finite set of legal rules that passively constrain the exercise of political power."[27]

The third contribution Macklem makes is to demonstrate the creative and mutually constitutive synergy of law and politics. Law is neither reducible to politics nor completely separate from politics. The history of indigenous difference in the constitution of Canada shows how law can become complicit in stabilizing relations of domination and perpetuating injustice, but Macklem is also interested in showing how legal artifice can play an important role in conditioning and mediating the inequalities of power that can inflect and often deflect political discourse and historical choice along trajectories of vested interest rather than paths of genuine dialogue and justice. Macklem's discussion of the significance of distributions of constitutional power for setting baseline entitlements in negotiations between Aboriginal peoples and the Crown is one of the best demonstrations of this thesis.[28]

The book's fourth contribution is to refute any simplistic opposition between idealistic concerns with justice and pragmatic concerns with stability. The distribution of constitutional power in Canada raises foundational and framework questions; however, these questions do not imply an irremediable illegitimacy in the constitution of Canada that necessitates either forgetting the past or being imprisoned by remembrance of past injustice. The status quo does not exercise a monopoly over the possibilities of stable legal order.[29] Questioning sovereignty does not have to mean expulsion into a state of nature or suspension of the constitutional

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[24] *Indigenous Difference*, *ibid.* at 36.

[25] *Ibid.* at 36, 23 respectively.

[26] *Ibid.* at 36.

[27] *Ibid.* at 21. These are just sample references. The point is illustrated at many points in the book. See *e.g. ibid.* at 163-64.

[28] For the relevant text, see *ibid.* 95-98. See also *ibid.* at 198, "judicial developments in the law of Aboriginal title ... have dramatic distributive effects on Aboriginal power ... ."

[29] On this, also see B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995), which discusses the politics of definition in relation to characterizations of order and chaos. See specifically *ibid.* at 25-26.

order in a revolutionary interregnum between the rejection of an old order and the foundation of a new order. Neither does it have to threaten the territorial integrity of the Canadian constitutional order. The wonderful paradox of recognizing indigenous difference (and the same might be said in relation to Quebec difference) is that it has the potential to strengthen the unity of the Canadian legal order through redressing the injustices that attenuate allegiance and that break down feelings of shared destiny and common belonging between Aboriginal peoples and non-Aboriginal people in Canada. The Canadian constitutional order, Macklem argues:

> owes its origins to a European world-view that regarded Aboriginal nations as insufficiently civilised to merit membership in the community of nations. As a founding principle of a modern state, a belief in Aboriginal inferiority casts long shadows over the legitimacy of Canadian claims of territorial sovereignty. In contrast, recognising constitutional significance of indigenous difference equates difference with equality. In so doing, it extends a measure of constitutional legitimacy not only to the fact of indigenous difference but to the Canadian constitutional order itself.[30]

To understand this claim, we must rejoin Macklem's discussion of sovereignty and the treaty process in his conclusion. Drawing on the work of Barsh and Henderson,[31] and in line with contemporary scholars,[32] Macklem argues for a reinterpretation of the history of Canadian sovereignty that moves beyond both narratives of conquest and fictions of discovery. He argues for a "flexible interpretation"[33] of sovereignty to overcome the false link between the affirmation of Aboriginal sovereignty and the negation of Canadian sovereignty. Instead of this either/or logic, Macklem proposes rethinking sovereignty in terms of a federal or treaty paradigm of constitutionalism in which sovereignty is not absolute or

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[30] *Indigenous Difference*, *supra* note 1 at 288.

[31] See in particular references to R.L. Barsh & J.Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley: University of California Press, 1980) in *Indigenous Difference*, *supra* note 1 at 153, 159.

[32] See *e.g. Strange Multiplicity*, *supra* note 16; "Organic", *supra* note 16; J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 4; *International Law*, *supra* note 18; K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L.J. 95; R.A. Williams Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997) [hereinafter *Linking Arms*]; "Genealogy", *supra* note 16; Canada, *Report of the Royal Commission on Aboriginal Peoples*, 5 vols., (Ottawa: Minister of Supple and Services Canada, 1996) (Co-chairs: R. Dussault & G. Erasmus) [hereinafter *Report*]; and Canada, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group, 1993) [hereinafter *Partners in Confederation*].

[33] *Indigenous Difference*, *supra* note 1 at 108-12.

unitary but relational and divided between a plurality of jurisdictions.[34] Understood in this way, treaties with Aboriginal peoples are not simply distributions of delegated state power rooted in a presumption of Crown sovereignty over Aboriginal peoples beyond the province of jurisprudence (as positivist hermeneutics of federal jurisdiction have traditionally assumed)[35] but instead *constitutive* elements of Canadian constitutional authority. By conceiving treaties as constitutive constitutional accords, rather than agreements rooted in a monistic and exclusive source of original constitutional authority and normative order, it becomes possible for us to imagine treaties as framing and expressing normative commitment to building a constitutional culture of mutual recognition and legal pluralism[36] rather than colonial domination and negation of First Nations.[37]

Although Macklem does not say this explicitly, in this conception the unity of the Canadian legal order is not a superimposed identity (a static "is") but resides in the *relationship* between the diverse communities that constitute Canada. Similarly, the history of Canada is not the history of one nation-community but the history of the hybrid relations between the multiple overlapping and interacting communities that constitute the community of Canada. The myth of indivisible Crown sovereignty gives way to the reality and ideal of not only federal distributions of sovereignty, founded on a logic of conquest or discovery, but the inherently federal constitution of original Canadian sovereignty rooted in a remembered history and logic of mutual recognition and pluralistic accommodation. As such, a way is opened up for recognizing Aboriginal constitutional authority and normative worlds without undermining the foundations of Canadian constitutional authority. The fear, as old as Hobbes, at the bottom of the modern act-of-state doctrine—that the only alternative to chaos is authoritarian order—is revealed for what it is in contemporary Canadian constitutionalism: a refuge not from the spectre of violence and civil war but from questioning the meaning and justice of preconceived thoughts and inherited distributions of constitutional power. Macklem shows not only

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[34] See *e.g. ibid.* at 154. For a comparable view, see "Organic", *supra* note 16 at 111: "aboriginal treaties not only contributed in a general way to the evolution of the Constitution, but also supplied part of its federal structure. This situation, sometimes described as 'treaty federalism,' has now been formally recognized and consolidated in section 35 of the *Constitution Act, 1982*."

[35] See Macklem's discussion in *Indigenous Difference*, *ibid.* c. 4. Note also *ibid.* at 167: "the judiciary tends to assume the constitutional legitimacy of the assertion of Canadian sovereignty over Aboriginal people, and *Van der Peet* is no exception." See *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507. Macklem argues that more recent jurisprudence continues, despite s. 35, to be predicated on this assumption.

[36] *Indigenous Difference*, *ibid.* at 155.

[37] For a comparable view, see B. Slattery's work in "Organic", *supra* note 16.

that contemporary Canadian jurisprudence "can no longer shirk the task of assessing the constitutional significance of Aboriginal prior sovereignty,"[38] but that such questioning provides a historic opportunity for extending a "measure of constitutional legitimacy not only to the fact of indigenous difference but to the Canadian constitutional order itself."[39]

I have only three critical remarks in relation to Macklem's argument. First, his theory may require more attention to be paid to the evolution of the historiographical consensus that he describes in terms of the four social facts that define indigenous difference. These four social facts are vital to recognizing the justice of indigenous peoples' struggle for recognition but they have not always been reflected in the narration of the relationship between Aboriginal peoples and the constitution of Canada. Their status as social facts, in other words, perhaps requires more explicit acknowledgement that their recognition is rooted in and dependent on a paradigm shift in Canadian constitutional historiography and historical consciousness. Macklem's argument requires a measure of intercultural consensus, not only at the level of basic principles of justice (to which he responds with the principles of substantive and formal equality and a redefinition of the constitutional enterprise in terms of distributive justice), but also in the historical narration of Canada. This is an ongoing project rather than an accomplished reality and cannot be taken for granted in the context of the traditional historiographical exclusion of Aboriginal peoples from the narration of Canada. It also requires differentiation from both relativist denials of truth in history and positivist denials of value in historical representation.

My second remark concerns the relative weight that Macklem places on the principles of equality and self-determination. While he provides an illuminating discussion of the principle of equality, his

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[38] *Indigenous Difference*, *supra* note 1 at 118. The reason why this is so significant is because as Slattery argues and Macklem underlines: "[c]ourts cannot take refuge in the act of state doctrine without forfeiting their moral authority and acting as passive instruments of colonial rule." Slattery is quoted in *ibid.* at 118 from his own article, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681 at 692. The integrity of Canadian constitutionalism is at stake.

[39] *Indigenous Difference, ibid.* at 288. In fact, on this point, Macklem's work should be read in conjunction with the works of Slattery, the late Howard Berman, the more recent work of Robert Williams Jr., James Tully, and the historiography of the Royal Commission on Aboriginal Peoples, which makes it possible to see the project of post-colonial constitutionalism not simply as a break from the past, but as a recovery and continuation of a trajectory buried in the eclipse of the formative treaty era in the nineteenth and twentieth centuries. For samples of these works, see B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32 Am. J. Comp. Law 361; "Organic", supra note 16. See also H. Berman's essay in O. Lyons et al. eds., *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution* (Sante Fe, Cal.: Clear Light Pub, 1998)____; *Linking Arms Together*, *supra* note 31; *Final Report*, *supra* note 31; and *Partners in Confederation*, *supra* note 31.

discussion of the principle of self-determination remains largely within the parameters of prevailing legal interpretations (albeit on the critical edge) and does not have the same philosophical depth.[40] We know from previous discussion that Macklem frames his argument for the recognition of indigenous difference through the relationship between equality (which requires like cases to be treated alike and different cases differently) and constitutional power (the good in question which becomes the hermeneutic lens for judging the relevance of the difference in question). In order, though, to understand the value of constitutional power, Macklem's argument requires the idea of self-determination—understood not simply in terms of conventional descriptions of the phenomenon, such as internal or external self-determination, but in its deepest significance as a constitutive human value. Without this deeper sense of self-determination—which serves to link and integrate Macklem's conception of justice and equality to a liberating vision of humanity—it is difficult to appreciate, on a normative level, why distributions of constitutional power ultimately matter.

Why, then, does Macklem hesitate to use the language of self-determination in articulating his argument? This brings me to my final remark. Macklem provides us with a clue to the answer when he states: "Notwithstanding the emerging distinction between external and internal self-determination in international law, the discourse of self-determination is difficult to adapt to the objective of allowing Aboriginal peoples to participate in Canadian, as well as their own, forms of government."[41] This statement and the surrounding text make it clear that at the heart of Macklem's reservation with the language of self-determination is the question concerning the reconciliation of the recognition of indigenous difference with equal citizenship.[42] However, it may be that Macklem's concern is not resolved by choosing the language of equality over self-determination. Rather, what is needed is discussion, on the one hand, of the just reconciliation of a constitutional commitment to equality with the recognition of multiple and differentiated citizenship rights and, on the other, a relational reconceptualization of self-determination that does not simply internalize into the Canadian constitutional framework separatist visions of each self exercising self-determination.

In fact, there is a double reconciliation at stake in the recognition of indigenous difference in the constitution of Canada: the reconciliation of differentiated civic rights with civic equality and the recognition of

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[40] See *Indigenous Difference*, *ibid.* at 34-40 for Macklem's discussion of self-determination.

[41] *Ibid.* at 39.

[42] To appreciate this link see *ibid.* at 288.

differentiated jurisdictional rights with Canadian unity. Similarly, distinctions need to be made both between the jurisdictional and civic rights dimensions of constitutional power and among Aboriginal peoples as constitutional entities, as individual citizens of Aboriginal nations, and those who identify as Aboriginal by virtue of their descent from members of Aboriginal nations but who do not or cannot (for reasons that deserve to be explored) claim or exercise Aboriginal citizenship. My concern with Macklem's argument is that it tends to elide a number of these distinctions. In many cases, these dimensions and references overlap; nonetheless, they should be distinguished conceptually because they implicate different rights claims, and sometimes different histories and normative justifications. These distinctions and the relevant histories that contextualize Aboriginal claims for differentiated rights and jurisdictions need to be worked through to make sense of the justice "of allowing Aboriginal peoples to participate in Canadian, as well as their own, forms of government."[43]

Macklem is absolutely correct to say that the question of why indigenous peoples should be entitled to both rights of self-government and autonomy and the right to continue to participate in political structures open to all Canadian citizens rests not simply on the right to self-determination but on the constitutional significance of the four social facts that comprise indigenous difference.[44] However, he makes the same point in relation to the principle of equality. In other words, eschewing the language of self-determination may not provide the best route to resolving the concern that leads Macklem to choose equality rather than self-determination as the axiological principle in his argument. In fact, it may be, as suggested in my second critique, that Macklem's argument needs the idea of self-determination to make sense of the ultimate value and meaning of indigenous peoples struggle for a redistribution of constitutional power in Canada.

None of these criticisms displace Macklem's argument. They merely provide a possible further conceptualization of his own argument and the directions in which it can, and perhaps should, be taken to strengthen the normative reasons for supporting the recognition of distinctive Aboriginal rights and jurisdictions in the constitution of Canada.

Throughout this review, I have focused on a few fundamental aspects of Macklem's book—his sense of the constitutional enterprise and his approach to constitutional reasoning. These are the aspects that in my reading theoretically and normatively integrate the whole. There are, though, as earlier stated, a number of different levels on which one can

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[43] *Ibid.* at 39.

[44] See *ibid.* at 40.

read the work and my own reading is certainly not exhaustive. Rather, it is meant as one contribution to a larger conversation that Macklem's book deserves to spark in the imagination of lawyers, philosophers, and citizens, both Aboriginal and non-Aboriginal, as he tries to communicate the deep normative reasons why indigenous difference matters and should be recognized as a constitutionally significant reality in a legal order that does not presume to be justice incarnate but is consciously struggling—through the imperfect words and worlds to which we are mortally bound—for greater justice and humanity. Questioning the justice of the legal order does not imply scepticism about the possibility of justice nor the negation of everything that is of value in Canadian constitutional traditions, but rather commitment to and humility before a great unfinished task.